U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B5

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 22 2007

SRC 06 183 51770

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner is a provider of wireless communications devices. It seeks to employ the beneficiary permanently in the United States as a senior performance engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job offer did not require an advanced degree professional.

On appeal, counsel asserts that the job requirements as stated on the ETA Form 9089, Part H, read in its entirety, equate to an advanced degree professional position as defined in the relevant regulation.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides that the job offer portion of the individual alien employment certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent."

The beneficiary possesses a foreign four-year bachelor's degree and more than five years of progressive experience. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. Thus, the beneficiary qualifies as a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2). The only issue in contention is whether the job offered requires a member of the professions holding an advanced degree.

The key to determining the job qualifications is found on ETA Form 9089, Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. CIS must look to the job offer portion of the alien employment certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this matter, Part H, Line 4, of the alien employment certification reflects that a bachelor's degree is the minimum level of education required. Significantly, Line 8 reflects that no *combination* of education (including no education whatsoever) "and" experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The exact language of Lines 6 through 10-A and the petitioner's responses are relevant to our evaluation and are repeated below.

Line 6: Is experience *in the job offered* required for the job? "No."
Line 10: Is experience in an alternate occupation acceptable? "Yes."
Line 10-A: If Yes, number of months experience in alternate occupation *required*: "60."
Line 10-B: Identify the job title of the acceptable alternate occupation: "Performance Engineer or Optimization Engineer or any combination thereof.

Line 14: "* (*con't from H.10-B*) any *suitable* combination of education, training or experience are acceptable."

(Emphasis added.) The director concluded that since the petitioner responded "no" on Line 6, no experience was required. On appeal, counsel asserts that the job does not require experience in the job offered and, thus, the petitioner could not respond affirmatively to question 6. In other words, the petitioner does not require a potential employee to have experience in the proffered position in order to qualify for the position, experience the beneficiary in this matter has only acquired with the petitioner. Counsel asserts that the job does require five years of experience, which may include experience in one of the listed alternate occupations.

As mentioned above, the alien is currently employed by the petitioner as a senior performance engineer, the position that is now being offered on a permanent basis. It is worth noting that DOL generally will not consider training and experience gained by an alien while working for the employer to be an employer's actual minimum requirements. 20 C.F.R. § 656.17(i)(3). Accordingly, DOL would not have permitted the petitioner to require the beneficiary to have gained the requisite experience within the job that is now offered on a permanent basis.

The confusion arises from the absence on the ETA Form 9089 of a general question as to whether any experience is required before breaking down the question as to whether that experience must be in the job offered or can be in an alternate occupation. The petitioner's responses must be afforded the most reasonable interpretation.

If we upheld the director's interpretation, we would be reading the job requirements as a bachelor's degree plus either no experience at all *or* five years of experience in an alternate occupation. Such a reading is irrational as it renders the responses to Line 10 and 10-A meaningless. Counsel's interpretation, however, that the job does require five years of experience, but not necessarily in the job offered, is reasonable and is in accord with the plain language of the form and its instructions. Counsel's interpretation is bolstered by the use of the word "acceptable" only in relation to the

alternate occupation. Significantly, Line 10-A, regarding the amount of experience, uses the word "required." Thus, the most reasonable interpretation for Section H in this matter, read as a whole, is that the job does require a bachelor's plus five years of experience, but not in the actual job that is being offered.

The language that appears in the petitioner's response to Line 14, quoted above, also bears discussion. If anything less than a bachelor's degree is acceptable, the job does not require an advanced degree professional. 8 C.F.R. § 204.5(k)(2). Once again, however, we have to read the entire Part H in context. As quoted above, on Line 14 the petitioner indicated that any "suitable" combination of education and experience would be acceptable. On Line 4 that the minimum education required is a bachelor's degree. On Line 8, the petitioner indicated that no other combination of education or experience, including a combination of experience and no education, would be acceptable. The petitioner expressly indicated in Line 14 that the language quoted above clarifies the petitioner's response to Line 10-B, which asks the petitioner to identify the job title of the acceptable occupation. Given the petitioner's responses to Lines 6 and 8, while the language in Line 14 could be clearer, we are satisfied that "suitable" education includes graduate level education, such as a Master's degree, in lieu of experience. Such an alternative does not suggest that the petitioner would accept anything less than a bachelor's degree plus five years of experience.

In light of the above, we are persuaded that the job requires an advanced degree professional.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.